IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Smt. Vishnu Kanta.
vs.
Jagdish and others.

S.B.CIVIL REVISION PETITION NO.164/2002 UNDER SECTION 115 CPC AGAINST THE ORDER DATED 5.12.2001 PASSED BY CIVIL JUDGE (J.D.), BALOTRA IN CIVIL SUIT NO.249/1973.

DATE OF JUDGMENT ::: 24.5.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.H Srimali, for the petitioner.

Mr.JM Bhandari, for the respondents.

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BY THE COURT:

REPORTABLE

Heard learned counsel for the parties.

The petitioner is aggrieved against the order dated 5.12.2001 by which the trial court allowed the plaintiff's application filed under Order 22 Rule 4

read with Rule 9 CPC dated 20.10.2000 and refused to dismiss the suit as abated.

The petitioner submitted an application under Order 43 Rule 1(k) read with Section 151 CPC on 23.5.2007 and sought permission to get this revision petition converted into civil misc. appeal. It will be relevant that this revision petition has been filed before this Court on 25.1.2002 and application for treating the revision as appeal has been filed after more than five years, on 23.5.2007.

It appears from the order dated 5.12.2001 that the trial court allowed the application of the plaintiff under Order 22 Rule 4 read with Rule 9 CPC and thereby has not refused to set aside the abatement of the suit nor it has dismissed the suit of the plaintiff, therefore, the order is not appealable under Order 43 Rule 1(k) which provides that the order shall be appealable if it is passed under Order 22 Rule 9 CPC and further if the order is of refusing to set aside the abatement or if the order is of the dismissal of the suit.

As stated above, the order is not of refusing to set aside the abatement nor is the order dismissing the suit, therefore, misc. appeal is not maintainable against this order.

Accordingly, the application for conversion of the revision petition into misc. appeal is hereby dismissed.

Learned counsel for the petitioner submitted that the trial court decreed the plaintiff's suit for redemption of mortgaged property by judgment and decree dated 30.9.1982. Said decree of the trial court was challenged by both the parties by preferring separate appeals which are Civil Appeal Decree No.30/1982 preferred by Ganga Shanker and Jagdish and Civil Appeal Decree NO.31/1982 preferred by Ram Chandra and Manohar Lal. The appellate court by judgment dated 25.4.1985 allowed the appeal and remanded the case back to the trial court for appointing Commissioner for taking the accounts and thereafter to decide how much amount is due and in whom the amount is due and thereafter to pass a decree for the money and for possession of the mortgaged property.

This order of the first appellate court dated 25.4.1985 was challenged by preferred S.B.Civil Second Appeal No.118/1985 before this Court. According to the petitioner, during pendency of the second appeal, defendant Ram Chandra (who was appellant in the second appeal) died on 27.6.1990. Plaintiff Ganga Shanker (who was respondent in the second appeal) died on 15.1.1996. This fact was in the knowledge of the plaintiffs and

the legal representative of plaintiff no.1 himself submitted an application in the second appeal on 22.10.1999 under Order 22 Rule 4 read with Rule 9 CPC and sought dismissal of the second appeal no.118/1985. Said legal representative of Ram Chandra, therefore, had full knowledge of the litigation as well as the fact of death of Ganga Shanker and Ram Chandra from the time of their death.

It appears from the record of S.B.Civil Second Appeal No.118/1985 that after above application was filed, the counsel for appellants Ram Chandra and Manohar Lal pleaded no instructions and, therefore, the appeal was dismissed by this Court by order dated 27.4.2000.

It may be relevant to mention here that further proceedings in the suit before the trial court in pursuance of the remand order passed by the first appellate court was stayed by this Court in second appeal no.118/1985 by order dated 26.1.1986.

According to learned counsel for the petitioner, in view of the fact that one of the plaintiff Jagdish himself, who was conducting the case through out and even before the High Court in second appeal, therefore, had full knowledge of the litigation as well as about the death of Ram Chandra and Ganga Shanker which is

clear from his application dated 21.10.1999 submitted in Court on 22.10.1999 which is supported by the affidavit of said Jagdish. Despite this specific knowledge, the plaintiffs before the trial court submitted application under Order 22 Rule 4 read with Rule 9 CPC on 20.9.2000 for setting aside the abatement of suit on the basis of false facts. It is submitted that in the said application, all the facts mentioned are false in the knowledge of the applicant Jagdish himself. Plaintiff Jagdish wrongly mentioned that the defendants/ appellants of S.B.Civil Second Appeal No.118/1985 submitted application under Order 22 Rule 4 CPC and plaintiff Jagdish wrongly stated that he had no knowledge of pendency of litigation. In view of the above reasons, the trial court committed serious error of law in setting aside the abatement of the suit of the plaintiffs.

It is also submitted that in fact, the trial court has mere observed against the appellants and condemned the appellants for not taking the steps in second appeal after the death of Ram Chandra and Ganga Shanker. It is submitted that even if the appellant did not take any step after the death of Ram Chandra and Jagdish, then the appeal could have been dismissed as abated but it could not have given any reason for setting aside of abatement of the suit on the application of the plaintiff on this ground or on the

ground of conduct of the appellants.

I considered the submissions of learned counsel for the petitioner and perused the record of S.B.Civil Second Appeal No.118/1985 as well as the order passed by the court below.

In fact, it appears that plaintiffs Ganga Shanker, Jagdish and Mohanlal filed the suit for redemption of mortgage property in the year 1973. The plaintiff's suit for redemption was decreed vide judgment and decree dated 30.9.1982. The plaintiffs and defendants preferred separate appeals against the said decree which were decided vide judgment and decree dated 25.4.1985. The first appellate court without setting aside the decree for redemption of mortgage directed the trial court to appoint Commissioner for taking accounts so that it may be decided how much amount is due in whom and thereafter to pass a money decree as well as decree for possession of the property obviously which is consequence of redemption of mortgaged property. The decree passed by the first appellate court on 25.4.1985 was challenged by the defendant by preferring S.B.Civil Second Appeal No.118/1985. Further proceedings before the trial court in pursuance of the judgment dated 25.4.1985 remained stayed throughout the pendency of above second appeal and ultimately, the

stay order was confirmed by the High Court by order dated 21.1.1986. The order dated 21.1.1986 is clear and it stayed the proceedings before the trial court in pursuance of the order of learned District Judge and further direction was that the trial court will not finally dispose of the matter till further orders.

Admittedly, the second appeal was dismissed on 27.4.2000 only. The application for setting aside of the abatement was submitted in the trial court on 20.9.2000. Therefore, there is delay of total less than five months including the period of 90 days within which the application for bringing on record the legal representatives could have been moved by the plaintiffs from the date of vacating stay against trial court proceeding with the suit. In fact, it was not mere stay of proceedings before trial court but the order of remand passed by the first appellate court, since was stayed by the High Court in second appeal, therefore, the record might have reached to the trial court but in eye of law, the trial court could not have dealt with or done anything in the suit as order of remand was not in force.

It appears from the reasons given by the trial court that the trial court has not properly looked into above facts and there was lack of assistance to Court in finding out the complete facts in the matter where the decree was subjected to first appeal and second

appeal and it took a time of almost 18 years. The trial court further committed error of law in observing that the present appellant since did not inform the plaintiff about the fact of death of Ram Chandra and Ganga Shanker as provided under Order 22 Rule 10A CPC, therefore, this can be a ground for condonation of delay or setting aside the abatement. Order 22 Rule 10A CPC cannot be read to mean as the person who has full knowledge of the fact of death of party is required to be informed by the other party through the court. In view of the above, the trial court's reason for condonation of delay on this ground cannot be sustained. Order 22 Rule 10A CPC is not meant for those persons who deliberately did not take action in time and they delayed the proceedings knowingly. The trial court was also not right in examining the conduct of the appellants how they handled their second appeal. It was the choice of the appellants of second appeal no.118/1985 whether to proceed with the appeal or not. The Court cannot compel any party to prosecute the case or appeal before the Court. It is total prerogative of the litigant whether to contest the suit or appeal or not. Because of the conduct of the party, if law permits, the suit or appeal can be dismissed but because of the conduct of the defendant neither the suit can be decreed nor the appeal can be allowed unless there are grounds in law for decreeing the suit

for allowing the appeal. In the same way, it was for the plaintiffs to show reasonable and good cause for not moving the application in time and at that time, the conduct, the conduct of the defendant was not very much relevant. It appears that the trial court was much influenced by the conduct of the defendant. The approach of the trial court was, therefore, wrong.

Even after holding that the reasons given by the trial court for setting aside of abatement cannot be justified, even then this revision petition is liable to be dismissed because of the reason that the proceedings before the trial court were stayed by the High Court by order dated 5.8.1985 and confirmed by order dated 21.1.1986, therefore, at that time, the plaintiffs were not expected to attend the proceedings in the Court proceedings before which was in consequence of remand order passed by the appellate court and the remand order itself was stayed in further appeal. It was not the case where only further proceedings in a suit were stayed wherein despite stay of the proceedings of the suit, the file remains pending in the trial court. In this case, at the cost of repetition, it may be observed that the plaintiff's suit itself was decided by the trial court on 30.9.1982 and remand order of the appellate court was stayed by this Court and in fact, no lis was pending before the

trial court or it has a clog over the suit. In these circumstances, the delay in filing the application of the appellant can be condoned on the basis of the grounds which are fact on record despite the fact that the plaintiffs were not bonafide in moving the application as the application contained same averments which were not true. The facts which were relevant for consideration at the time of finding out whether the suit should be dismissed as abated, are that whether there is a delay on the part of the plaintiff so as to take some benefit and whether there is a ulterior motive ?

As observed above, since the proceedings of the trial court were stayed by this Court and that stay came to an end on 27.4.2000 and application has been filed in the Court on 20.9.2000, therefore, in view of the above reasons, the order taking on record the legal representatives of Ram Chandra and Ganga Shanker remains as it is but for different reasons.

In view of the above discussion, this revision petition, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya